

OCA FILE

leg

16 August 1988

OCA 2779-88

MEMORANDUM FOR: C/L&PLD/OGC
PMS/OL [redacted]

FROM: [redacted] Legislation Division
Office of Congressional Affairs

SUBJECT: Reauthorization of the Office of Federal
Procurement Policy Act of 1988, S. 2215

1. Attached for your information is a copy of the above-captioned bill. It creates a Federal Acquisition Regulatory Council, which will issue the Federal Acquisition Regulation. It appears this provision (section 25(c)) poses little problem for the Agency because it is linked to section 4(4) of the current law, which allows agencies to promulgate their own regulations to satisfy their unique needs. Neither does section 26(f)(2) regarding adherence to cost-accounting standards appear to pose a problem, as it allows agencies to waive these requirements when in the public interest.

2. If this bill does pose a problem, please telephone me

Attachment

OCA/RMH/bsb: [redacted] 16 Aug 88

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CONGRESSIONAL RECORD -- SENATE

STAFF

REAUTHORIZATION OF CERTAIN GOVERNMENT CONTRACTS
Sec. 2. Section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 438) is amended--

(1) by redesignating such section as subsection (a) of section 34; and
 (2) by adding at the end thereof the following new subsection:

"(b)(1) The provisions of subsection (a) shall not apply to any agreement between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose of conducting federally sponsored research and related activities.

"(2) Under any agreement described under paragraph (1), costs incurred by personnel for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent that such costs do not exceed--

"(A) charges normally allowed by the respective institution in its regular operations as a result of an institutional policy; and

"(B) the limits and principles as are provided for by governmentwide regulation of such costs established by the Director of the Office of Management and Budget.

"(3) The regulation under paragraph (2)(B) shall specifically provide that in the absence of an institutional policy regarding travel costs, the rates and amounts established under subchapter 1 of chapter 57 of title 5, United States Code, or by the Administrator of General Services or the President (or his designee) pursuant to any provisions of such subchapter shall apply to agreements between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose of conducting federally sponsored research and related activities."

On page 10, strike out lines 20 through 22, and insert in lieu thereof:

all prime contracts with the United States in excess of \$500,000 entered into using procedures other than sealed bid procedures, and subcontracts in excess of \$500,000 thereunder, other than contracts or subcontracts in which the price is based on--

"(A) established catalog or market prices of commercial items sold in substantial quantities to the general public;

"(B) prices set by statute or regulation; or

"(C) fixed price contracts entered into based on adequate price competition.

Mr. BYRD. Mr. President, I ask unanimous consent that the amendments be adopted en bloc.

The PRESIDING OFFICER. Without objection, it is so ordered.

Amendment No. 2858 was agreed to.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is on agreeing to the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute as amended, was agreed to.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill (S. 2215) was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 2215

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Reauthorization of

the Office of Federal Procurement Policy Act of 1950"

REAUTHORIZATION OF THE OFFICE OF FEDERAL PROCUREMENT POLICY

Sec. 2. Section 11 of the Office of Federal Procurement Policy Act (41 U.S.C. 410) is amended by striking out "for the fiscal year ending September 30, 1984, and for each of the three succeeding fiscal years" and inserting in lieu thereof "for each fiscal year".

GOVERNMENT-WIDE PROCUREMENT REGULATIONS

Sec. 3. Section 6(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(b)) is amended by inserting after "timely manner," the following: "including any such regulations, procedures, and forms as are necessary to implement prescribed policy initiated by the Administrator under subsection (a)."

FEDERAL ACQUISITION REGULATORY COUNCIL

Sec. 4. The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end thereof the following new sections:

"FEDERAL ACQUISITION REGULATORY COUNCIL

"Sec. 25. (a) There is established a Federal Acquisition Regulatory Council (hereinafter in this section referred to as the 'Council') to assist in the direction and coordination of procurement regulatory activities in the Federal Government.

"(b) The members of the Council shall be the Administrator and the official assigned by statute with the responsibility for acquisition policy in each of the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. If no official in any of such agencies is assigned by statute with the responsibility for acquisition policy for such agency, the head of such agency or any official designated by the head of such agency shall represent the agency on the Council.

"(c) Subject to the provisions of section 6 of this Act, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to the respective authority of each such agency under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), chapters 4 and 137 of title 10, United States Code, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451 et seq.), shall jointly issue and maintain a single Government-wide procurement regulation, to be known as the 'Federal Acquisition Regulation'. An executive agency may promulgate a procurement regulation only to the extent that such regulation is appropriate to a 'single system of Government-wide regulations' as such term is defined under section 4(4) of this Act. The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation.

"(d) Subject to the authority, direction, and control of the head of the agency concerned, each official described or appointed under subsection (b) shall--

"(1) approve or disapprove all proposed and all final regulations of the department or agency of such official relating to procurement;

"(2) carry out the responsibilities of the department or agency set forth in chapter 35 of title 44, United States Code, for each information collection request (as defined in section 3502(11) of title 44, United States Code) that relates to procurement rules or regulations; and

"(3) eliminate or reduce the redundant or unnecessary levels of regulatory review in the procurement system of the department or agency of such official.

"(e) All actions of the Council and of members of the Council shall be in accordance with and in furtherance of the policies of sections 2 and 3(a) of this Act.

"(f) Subject to the provisions of section 3(b), the Council shall--

"(1) manage, direct, coordinate and monitor the maintenance and issuance of modifications of the Federal Acquisition Regulation;

"(2) publish a report 6 months after the date of enactment of this section and every 6 months thereafter relating to the development of procurement regulations to be issued jointly by members of the Council and to the extent appropriate, by each of the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration;

"(3) include in each report published under paragraph (2)--

"(A) the status of each such regulation;

"(B) a description of the regulations which are required by statute;

"(C) whether public comment in accordance with section 22 of this Act, and to the extent appropriate, sections 3504(h) and 3507 of title 44, United States Code, was sought with regard to each proposed regulation;

"(D) regulatory activities completed and initiated since the most recently published report;

"(E) regulations, policies, procedures, practices, and forms under consideration or review by the Office of Federal Procurement Policy;

"(F) whether the regulations have paperwork requirements;

"(G) the progress made in promulgating and implementing the Federal Acquisition Regulation; and

"(H) such other matters as the Administrator determines useful; and

"(3) within 180 days after the date of the enactment of this section, submit a report to the Congress, after consultation with the Administrator of the Office of Information and Regulatory Affairs, regarding--

"(A) the extent of the paperwork burden created by the Federal procurement process; and

"(B) the extent to which the Federal procurement system can be streamlined to reduce unnecessary paperwork while maintaining recordkeeping and reporting requirements necessary to ensure the integrity of the system.

"COST-ACCOUNTING STANDARDS BOARD

"Sec. 26. (a)(1) There is established within the Office of Federal Procurement Policy the 'Cost-Accounting Standards Board' (hereinafter referred to as the 'Board'), which shall consist of 5 members, including the Administrator, who shall serve as Chairman, and 4 other members, all of whom shall have experience in Government contract cost accounting and who shall be appointed as follows:

"(A) two shall be appointed who are officers or employees of the Federal Government--

"(i) one of whom shall be an officer or an employee of the Department of Defense and shall be appointed by the Secretary of Defense; and

"(ii) one of whom shall be an officer or an employee of the General Services Administration appointed by the Administrator of General Services.

"(B) one shall be appointed by the Administrator from private industry; and

"(C) one shall be appointed by the Administrator from the accounting profession.

of the term for which he was appointed, and

(ii) no individual who is appointed under paragraph (1)(A) of this section shall continue to serve on the Board after ceasing to be an officer or employee of the agency from which appointed.

(B) A vacancy on the Board shall be filled in the same manner in which the original appointment was made.

(C) The initial members of the Board shall be appointed no later than 90 days after funds are appropriated under subsection (1)(1) of this section.

(3) Each member of the Board who is not an officer or employee of the Federal Government shall receive compensation at a rate not to exceed the daily equivalent of the rate prescribed for level V of the Executive Schedule for each day (including travel-time) in which the member is properly engaged in the actual performance of duties vested by law in the Board.

(b) The Administrator, after consultation with the Board, may appoint an executive secretary and two additional staff members without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may pay such employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

(c) The Administrator may appoint, fix the compensation, and remove additional employees of the Board under the applicable provisions of title 5, United States Code.

(d)(1) The Board may use, without reimbursement, any personnel of a Federal agency (with the consent of the head of the agency concerned) to serve on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section.

(2) The Administrator, after consultation with the Board, may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, of personnel for the purpose of serving on advisory committees and task forces to assist the Board in carrying out the functions and responsibilities of the Board under this section. Any individual so hired may be paid at rates for individuals not to exceed the daily equivalent of the rate of pay payable for level V of the Executive Schedule for each day (including travel time) in which such an individual is properly engaged in the actual performance of duties under this section.

(e) Except as otherwise provided in subsection (a), the members of the Board who are officers or employees of the Federal Government, and officers and employees of other agencies of the Federal Government who are utilized under subsection (d) shall receive no additional compensation for services, but shall continue to be compensated by the employing Department or agency of such officer or an employee. Appointees under subsection (d) from private life may receive compensation at rates fixed by the Administrator, but not to exceed the daily equivalent of the rate prescribed for level V of the Federal Executive Salary Schedule under section 5316 of title 5, United States Code, for each day (including traveltime) in which such appointees are properly engaged in the actual performance of duties under this section. While serving away from

with section 5705 of title 5, United States Code.

(1) The Administrator, after consultation with the Board, shall have the exclusive authority to make, promulgate, amend, and rescind cost-accounting standards and interpretations designed to achieve uniformity and consistency in the measurement, assignment, and allocation of costs to contracts with the United States.

(2) Subject to the provisions of paragraph (3) and subsection (1)(1), the cost-accounting standards, promulgated by the Administrator after consultation with the Board, shall be used by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing, administration, and settlement of all prime contracts with the United States in excess of \$500,000 entered into using procedures other than sealed bid procedures, and subcontracts in excess of \$500,000 thereunder, other than contracts or subcontracts in which the price is based on—

(A) established catalog or market prices of commercial items sold in substantial quantities to the general public;

(B) prices set by statute or regulation; or

(C) fixed price contracts entered into based on adequate price competition.

(3)(A) The Administrator, after consultation with the Board, may exempt classes or categories of contractors and subcontractors from the requirements of this section;

(B) The Administrator, after consultation with the Board, shall establish procedures and criteria for the waiver of the requirements of this section with respect to individual contracts and subcontracts; and

(C) Under the procedures and criteria established under subparagraph (B), the head of any executive agency may waive the requirement of this section with respect to individual contracts or subcontracts if such a waiver is in the public interest.

(g)(1) The single system of Government-wide procurement regulations shall include regulations for the implementation of cost-accounting standards promulgated under subsection (f). Such regulations shall require any contractor or subcontractor as a condition of contracting with the United States to—

(A) disclose in writing the cost-accounting practices of such contractor or subcontractor, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs; and

(B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor by the United States because of the failure of the contractor to comply with duly promulgated cost-accounting standards or to consistently follow the disclosed cost-accounting practices of such contractor.

(2) The interest rate applicable to the price adjustment shall be the annual rate of interest established under section 6621 of the Internal Revenue Code of 1986 for such period. Such interest shall accrue from the time payments of the increased costs are made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment. If the parties fail to agree as to whether the contractor or subcontractor has complied with cost-accounting standards, the rules and regulations relating thereto, and cost adjustments demanded by the United States, such disagreements shall constitute a dispute under the Contract Disputes Act (41 U.S.C. 601 et seq.).

standards, and modifications thereof, the Administrator, following consultation with the Board, shall—

(A) take into account—

(i) the probable costs of implementation including inflationary effect, if any, compared to the probable benefits;

(ii) the advantages, disadvantages, and improvements anticipated in the pricing, administration, and settlement of contracts; and

(iii) the scope of, and alternatives available to, the action proposed to be taken;

(B) prepare and publish a report in the Federal Register on the issues reviewed under paragraph (1)(A);

(C)(i) publish an advanced notice of proposed rulemaking in the Federal Register in order to solicit comments on the report prepared pursuant to paragraph (1)(B);

(ii) provide all parties affected a period of not less than 60 days after such publication to submit views and comments;

(iii) during such 60-day period, consult with the Comptroller General and consider any recommendation of the Comptroller General; and

(D) publish a notice of proposed rulemaking in the Federal Register and provide all parties affected a period of not less than 60 days after such publication to submit views and comments.

(2) Rules, regulations, cost-accounting standards, and modifications thereof shall have the full force and effect of law, and, except as provided in paragraph (3), shall become effective no sooner than 120 days after publication in the Federal Register in final form. Implementation dates for contractors and subcontractors shall be determined by agreement with the applicable Federal agency, but in no event later than the beginning of the second fiscal year of the contractor or subcontractor after a standard becomes effective. Rules, regulations, cost-accounting standards, and modifications promulgated by the Administrator shall be accompanied by prefatory comments, and by illustrations if necessary.

(3) The requirements of paragraph (1) and the effective dates in paragraph (2) shall be waived if the Administrator determines that urgent and compelling circumstances make compliance with such requirements impracticable. A cost-accounting standard or modification of a cost-accounting standard for which the requirements of paragraphs (1) and (2) are waived shall be effective on a temporary basis provided that the Administrator—

(A) publishes a notice of such cost-accounting standard or modification of a cost-accounting standard in the Federal Register and includes a statement that the cost-accounting standard or modification of a cost-accounting standard is temporary;

(B) provides for a public comment period of not less than 30 days beginning on the date that the notice is published;

(C) takes into account—

(i) the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits;

(ii) the advantages, disadvantages, and improvements anticipated in the pricing, administration, and settlement of contracts; and

(iii) the scope of, and alternatives available to, the action proposed to be taken; and

(D) prepares and publishes a report in the Federal Register on the issues reviewed under paragraph (C) as part of the notice of final rulemaking.

August 11, 1989

CONGRESSIONAL RECORD -- SENATE

S 11735

"(4) The functions exercised under this section are excluded from the operation of sections 551, 553 through 559, and 501 through 506 of title 5, United States Code.

"(5) The Administrator, after consultation with the Board, shall report to the Congress no later than 1 year after the date of enactment of this section, and annually thereafter, with respect to the activities and operations of the Board under this section, together with any appropriate recommendations.

"(X1) All cost-accounting standards, interpretations, modifications, rules, and regulations (including exemptions) promulgated by the Cost-Accounting Standards Board under section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) shall remain in effect unless amended, superseded, or rescinded by the Administrator pursuant to this section.

"(2) Cost-accounting standards in effect before the date of enactment of this section referred to in paragraph (1) shall be subject to the provisions of this section in the same manner as if promulgated by the Administrator under this section.

"(3) The Administrator, under the authority set forth in section 6 of this Act, shall ensure that costs which are the subject of cost-accounting standards promulgated under this section shall not be subject to regulations that are established by another executive agency that differ from such standards with respect to the measurement, assignment, and allocation of such costs.

"(k) For purposes of determining whether a contractor or subcontractor has complied with cost-accounting standards and has followed consistently the disclosed cost-accounting practices, any authorized representative of the head of the agency concerned, of the offices of Inspector General established pursuant to the Inspector General Act of 1978, or of the Comptroller General of the United States may examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to, and solely for the purpose of ensuring compliance with such cost-accounting standards.

"(1) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

"(2) Section 719 of the Defense Production Act of 1950 (50 U.S.C. App. 2168) is repealed."

PROFIT METHODOLOGY STUDY

SEC. 5. (a) The Administrator shall conduct a study to develop a consistent methodology which executive agencies may use for measuring the profits earned by Government contractors on procurements, other than procurements where the price is based on adequate price competition or on established catalog or market prices of commercial items sold in substantial quantities to the general public.

(b) The methodology developed under subsection (a) shall include adequate procedures for verifying and maintaining the confidentiality of financial data of contractors.

STUDY AND REPORT BY THE ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY

SEC. 6. No later than April 1, 1989, the Administrator for Federal Procurement Policy, in consultation with the Comptroller General, shall conduct a study and submit a report to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives—

(1) on the extent to which the data collected by the Federal Procurement Data System is adequate for the management, oversight and evaluation of Federal procurement; and

(2) which shall include any appropriate recommendations for improvements of such system.

ELEVATION OF PRESIDENTIAL APPOINTEES WITHIN THE OFFICE OF MANAGEMENT AND BUDGET

SEC. 7. (a) Section 5312 of title 5, United States Code, is amended by adding at the end thereof "The Director of the Office of Management and Budget."

(b) Section 5313 of title 5, United States Code, is amended—

(1) by adding at the end thereof "Deputy Director of the Office of Management and Budget."; and

(2) by striking out "The Director of the Office of Management and Budget."

(c) Section 5314 of title 5, United States Code, is amended by—

(1) adding at the end thereof "Administrator for Federal Procurement Policy" and "Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget."; and

(2) striking out "Deputy Director of the Office of Management and Budget."

(d) Section 5315 of title 5, United States Code, is amended—

(1) by striking out "Administrator for Federal Procurement Policy."; and

(2) by striking out "Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget."

(e) The amendments made by this section shall be effective on January 20, 1989.

TRAVEL EXPENSES UNDER CERTAIN GOVERNMENT CONTRACTS

SEC. 8. Section 24 of the Office of Federal Procurement Policy Act (41 U.S.C. 420) is amended—

(1) by redesignating such section as subsection (a) of section 24; and

(2) by adding at the end thereof the following new subsection:

"(b)(1) The provisions of subsection (a) shall not apply to any agreement between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose of conducting federally sponsored research and related activities.

"(2) Under any agreement described under paragraph (1), costs incurred by personnel for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered reasonable and allowable only to the extent that such costs do not exceed—

"(A) charges normally allowed by the respective institution in its regular operations as a result of an institutional policy; and

"(B) the limits and principles as are provided for by government-wide regulation of such costs established by the Director of the Office of Management and Budget.

"(3) The regulation under paragraph (2)(B) shall specifically provide that in the absence of an institutional policy regarding travel costs, the rates and amounts established under subchapter I of chapter 57 of title 5, United States Code, or by the Administrator of General Services or the President (or his designee) pursuant to any provisions of such subchapter shall apply to agreements between an executive agency and a State institution, or an executive agency and a nonprofit institution, entered into for the purpose of conducting federally sponsored research and related activities."

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill, as amended, was passed.

Mr. JOHNSTON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

THE LEGISLATIVE CALENDAR

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The majority leader.

Mr. BYRD. Mr. President, I inquire of the distinguished Republican leader if the following calendar orders on the Calendar of Business have been cleared on his side. Calendar Orders Nos. 878, 884, 888, 890, 891, 892, 893, 896, 897, and 898.

Mr. DOLE. They have been cleared on this side.

Mr. BYRD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of the foregoing calendar orders; that they be considered en bloc; that amendments where shown be adopted; that where Senators have statements that they wish to have appear appropriately in the Record as though read such statements so appear; and that the bills and resolutions be agreed to en bloc; that any amendments to titles or to preambles be agreed to; and that the motion to reconsider en bloc be laid on the table.

The PRESIDING OFFICER. Is there objection?

Mr. DOLE. There is no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADMINISTRATION OF PERSONNEL SYSTEMS IN THE GENERAL ACCOUNTING OFFICE

The bill (H.R. 4318) to improve the administration of the personnel systems of the General Accounting Office, was considered, ordered to a third reading, read the third time, and passed.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. DOLE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PROHIBITION AGAINST LICENSING OF CERTAIN FACILITIES ON THE SALMON AND SNAKE RIVERS, IDAHO

The Senate proceeded to consider the bill (S. 2102) to prohibit the licensing of certain facilities on portions of the Salmon and Snake Rivers in Idaho, and for other purposes, which had been reported from the Committee on Energy and Natural Resources, with amendments, as follows:

(The parts of the bill intended to be stricken are shown in boldface brackets, and the parts of the bill intended to be inserted are shown in italic.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Federal Energy Regulatory Commission shall not [license] issue any preliminary permit, license, or exemption from licensing for the construction of any dam, diversion or bypass under the Federal Power Act (41 Stat. 1063), as amended, on—